Supreme Court, U.S.
FILED
NOV 18 2002
CLERK

(4)

No. 02-595

In the Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of
The Estate of Colonel William Densberger, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

MAC S. DUNAWAY
GARY E. CROSS
MATTHEW F. HALL
Dunaway & Cross
1100 Connecticut Avenue, NW
Suite 410
Washington, D.C. 20036
(202) 862-9700

Counsel for Amicus Curiae

23pp

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INTEREST OF THE AMICUS

The Aerospace Industries Association of America, Inc. ("AIA") is the national, non-profit trade association representing manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA's members include many of the nation's largest corporations providing military equipment to the federal government pursuant to government contracts similar to the contract involved in this case. AIA is concerned that the decision of the court below, which addresses the application of the government-contractor defense to allegations of failure to warn, will have serious adverse effects upon the contractual relationship between the federal government and the companies with whom it contracts for military equipment.[1]

SUMMARY OF ARGUMENT

The application of this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), to failure-to-warn claims requires clarification if the federal government is to receive the full benefit of contractors' expertise in the development of unique military equipment for our armed forces. Absent clarification, government contractors must assume that the government-contractor defense will be ineffective in many jurisdictions so long as the plaintiff artfully pleads a failure-to-warn claim, even though the defense would prevail against a claim of design defect in the same case.

The absence of predictable and reliable criteria for the application of the defense forces contractors to assume the

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[1] Petitioner United Technologies Corporation and Respondents Kathleen Densberger, *et al.*, consent to the filing of AIA's brief *amicus curiae*. Copies of their respective written consents accompany this brief, which was written in its entirety by the undersigned counsel for AIA and funded by AIA and its members.

worst. Contractors will be increasingly hesitant to commit to the long-term cooperative relationship that typifies the development of advanced-technology military equipment and systems and that is essential to the government's objective of acquiring equipment that will satisfy extreme mission requirements while operating as safely as practicable. Uncertainty about the viability of the defense against failure-to-warn claims, combined with restrictions on contractors' ability to discover latent dangers as a result of discretionary government decisions, inevitably increases contract costs. It also dilutes the value of the contractor's expertise because the prospect of failure-to-warn claims pressures contractors to expand, with an eye toward litigation, the information and options they place before the contracting officer. This promotes defensive warning and overwarning at the expense of effective warning.

The conflict among the lower courts arises out of the diverse multitude of warnings, instructions, directions and other forms of communication that accompany government contracts for military equipment, as well as the variety of state-law causes of action and doctrines that have evolved under the rubric of "failure to warn." In some jurisdictions, courts have treated warnings that accompany military products, such as flight manuals, as attributes of the product's design and have applied *Boyle's* familiar three-part test to claims that user warnings were inadequate. But other courts, in cases involving military and non-military products, have rewritten *Boyle* in failure-to-warn cases, imposing such unrealistic requirements that the defense will be impossible to establish.

Further confusion arises when, as in this case, the duty to warn runs to the government rather than to the ultimate user and the plaintiff includes a claim of negligent failure to warn in the complaint. While these claims sound in negligence rather than strict liability, they implicate the contractor's relationship

with the military just as directly as does a claim of design defect. The court below, after questioning whether *Boyle* applies at all to these claims, articulated a test that ignores *Boyle's* rationale and reinserts state-law standards into the contractor and government relationship. Whether and to what extent *Boyle* displaces state law when the plaintiff alleges a negligent failure to warn the government are issues that will likely arise in many if not most cases. The opinion of the court below, along with other equally cryptic opinions, amply demonstrates the need for clarification.

The improper application of *Boyle* to various types of failure-to-warn claims, whether the warnings run to end users, to the government, or to the government for the benefit of end users, has led to the proposition that contractors cannot establish the government-contractor defense against failure-to-warn allegations unless they somehow prove that the government contractually precluded them from obtaining and providing certain safety-related information to the government. This unworkable test may betray a misconception of how safety information is generated by the contractor and the government and shared between them, or it may reflect a basic disagreement with the policy behind *Boyle*. Whatever its origin, it permits the government-contractor defense to prevail against a classic design-defect claim, yet to fail against a failure-to-warn claim on exactly the same facts. In other words, the label the plaintiff places on the evidence, not the evidence itself, will determine liability.

Contractors need to know the limits of their responsibility for discovering safety-related information in connection with their performance under military procurement contracts. As against a design-defect claim, *Boyle* is clear that the contractor must meet an actual-knowledge standard and will not be liable for the failure to discover latent defects in what is ultimately the government's design. If contractors must meet a more

stringent state-law standard whenever the plaintiff recasts the allegations as a failure to warn, which can occur in virtually any case, then the defense offers no meaningful protection. The practical effect of misapplying *Boyle* to warning claims is to nullify *Boyle* in all cases, because the liability is the same whether the claim is design defect or failure to warn. *Boyle* obviously did not intend this consequence.

ARGUMENT

EFFECTIVE CONTRACTOR PARTICIPATION IN THE PROCUREMENT PROCESS REQUIRES A REALISTIC GOVERNMENT-CONTRACTOR DEFENSE AGAINST FAILURE-TO-WARN ALLEGATIONS

Failure-to-warn allegations against military contractors typically attack the warnings that accompany a product, or that the plaintiff alleges should have accompanied the product, such as the warnings and instructions in a flight manual. Depending on the jurisdiction, these allegations of inadequate user warnings may be part of the design-defect claim or they may be stated separately under negligence or warranty theories.[2] The lower courts are split on how to apply *Boyle* to these failure-to-warn claims. Some circuits, correctly in AIA's view, hold that *Boyle* applies to user-warning cases in the same way that it applies to product-design cases.[3] Other circuits hold that

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[2] For example, as noted by the court below, the Connecticut Product Liability Act "discusses the duty to warn in terms of product defect, that is, in terms of strict liability and liability for violation of implied warranties." *Densberger v. United Technologies Corp.*, 297 F.3d. 66, 71 (2nd Cir. 2002) (citation omitted).

[3] *See, e.g., Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000); *Tate v. Boeing Helicopters*, 140 F.3d 654, 658-61 (6th Cir. 1998); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1004, n.8 (7th Cir. 1996).

applying *Boyle* to user-warnings issues requires the contractor to establish that the government proscribed the warnings that the plaintiff alleges were necessary or prescribed the warnings that the plaintiff alleges were flawed, placing a burden on the contractor in warning cases that is not present in pure design cases.[4]

The split in the circuits regarding *Boyle's* application to warnings that accompany government-ordered products needs resolution. If user warnings accompanying military equipment are to be treated differently than the equipment itself for purposes of the government-contractor defense, government contractors will have to account for the difference as they decide whether to undertake the preparation of flight manuals and similar materials, how to factor the increased risk into their proposals, and how best to position themselves for future litigation.

Failure-to-warn allegations can also center on information that the contractor allegedly failed to provide to the government itself. These allegations may reflect state-law concepts such as the learned intermediary doctrine,[5] the sophisticated user defense,[6] or the continuing duty to warn after the initial sale of the product,[7] but their essence rests on basic negligence principles and they can be alleged as an additional

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[4] *See, e.g., Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 632 (2nd Cir. 1990) (asbestos); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489-90 (11th Cir. 1990) (asbestos); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997)(military helicopter).

[5] *Densberger*, 297 F.3d at 75 ("All parties to the present action . . . have agreed that [Sikorsky] had no duty whatsoever to warn the ultimate product users, *i.e.*, the pilots.")

[6] *Emory v. McDonnell Douglas*, 148 F.3d 347 (4th Cir. 1998)(military contractor not responsible for warning the individual military personnel who fly planes under military command).

[7] *Densberger*, 297 F.3d at 71 ("Because the CPLA does not expressly prohibit post-sale liability for negligent failure to warn, the negligence-based common law duty survives and is cognizable under the statute.")

count in virtually any product liability case. The gravamen of the plaintiff's allegation is that, if the contractor had provided the information to the government that a reasonable manufacturer would have provided, then the plaintiff would not have suffered this injury.

The court below suggests that the government-contractor defense may be irrelevant against these "failure-to-warn-the-government" claims and that, even if relevant, the defense would require the contractor to show "that the Government controlled or limited the ability of contractors . . . themselves to warn those who come into contact with its product." *Densberger*, 297 F.3d at 76, *quoting Grispo*, 897 F.2d at 630. Against a claim of failure to warn the government, this test apparently means that the contractor must show that the government prevented the contractor from warning the government, an almost surreal proposition that contractors will not be able to establish.

The Ninth Circuit, in *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997), has expressed a similarly unworkable view in addressing the claim that the contractor failed to warn *the government* after delivery of the product, stating, "The issue here is whether Bell's obligations under its contract with the government were in conflict with its performance of whatever duty state law might have imposed on it." Again, apparently, the contractor must somehow prove that the contract prevented it from providing information to the government.

Whether the failure-to-warn claim focuses on the contractor's role in developing user warnings for a flight manual or more generally on the contractor's failure to warn the government, judicial opinions that impose additional conditions upon the government-contractor defense in failure-to-warn cases upset the careful balance that *Boyle* strikes between requiring the exercise of government discretion in

safety decisions while not deterring valuable contractor participation in those decisions. If the defense requires a showing that the government dictated all warnings, was presented with all warning options, and actually prevented the contractor from presenting additional options and information, then the defense will have no true viability in the real world of government procurement.

EQUIPMENT WARNINGS EVOLVE IN THE SAME WAY AS EQUIPMENT DESIGNS

Government contracts for the development of sophisticated military equipment typically include in the scope of work the task of developing a host of user warnings and instructions, including product labels, maintenance and repair instructions, training materials, flight manuals, and other literature. These materials are not intended primarily to communicate dangers to government contract personnel for the purpose of selecting a design, but rather to communicate with those who actually use (or repair and maintain) the equipment on how to do so more safely or effectively. User warnings accompany the product, are finalized only after the product design is finalized, and are, in every sense, part of the product.[8]

The same contractor-government interaction that characterizes the development of hardware designs for sophisticated government equipment describes the process for developing the user warnings that will accompany that

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[8] These user communications are not coextensive with the safety information that a government contractor provides to the government in the course of selecting and developing a design for a product. Whereas the government contractor's communications to the government *identify* potential problems, communications to the user *address* those problems, separately or in conjunction with other steps, such as redesigning the equipment, placing restrictions on its use, or providing special training.

hardware. As in this case, the contractor will typically develop a draft flight manual, analogous to a hardware prototype, and then engage the government in extensive back-and-forth discussions about needed revisions until a final manual is selected. The final version of the flight manual (or maintenance manual or product labeling) is tied directly to the ultimate design of the equipment, because a change in the hardware likely necessitates a change in the information provided to the user.

The degree of government involvement in the selection of the final user warnings and instructions can range from the government initiating the drafts, to the government reviewing and approving the contractor's proposals in varying levels of detail, to the government merely rubber-stamping the contractor's proposals. In short, the range of government involvement in developing, approving and ultimately selecting user warnings directly parallels the government role in developing, approving and selecting the equipment's hardware design. *See, e.g., Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154-55 (6th Cir. 1995) (Army initially developed and actively participated in the design process for helicopter tandem hooks) (*Tate I*); *Tate v. Boeing Helicopters*, 140 F.3d 654, 658-61 (6th Cir. 1998) (Army actively involved in development of operators' manual) (*Tate II*); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 998-99 (7th Cir. 1996)(Marine Corps actively involved in design process and provided reasonably precise specifications for warnings); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1486 (5th Cir. 1989) (Navy rubber-stamped contractor's design); *Emory v. McDonald Douglas*, (4th Cir. 1998) (contractor prepared initial drafts of manuals but Navy worked closely with contractor and retained control over manuals' text).

Requiring the contractor to establish that the government specifically rejected a particular user warning or mandated one

and only one warning method, as opposed to establishing that the government approved "reasonably precise specifications" for warnings, departs from the rationale of *Boyle*. *Boyle* does not require that the government prepared the design specifications, that the government dictated one and only one design, that the government specifically rejected the alternative design urged by the plaintiff in litigation, or that the specifications addressed the specific design defect alleged by the plaintiff. *See, e.g. Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 437 (5th Cir. 2000); *Trevino*, 865 F.2d at 1480; *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 799 (5th Cir. 1993). Plaintiffs can always point to additional or alternative warnings not considered by the government, claiming that state law required those warnings and that the federal government did not prohibit them (having not considered them). *Boyle* rejects this approach for defective-design claims as it was set forth by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), because it would "penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." 487 U.S. at 513.[9]

If government contractors are foreclosed from establishing the government-contractor defense unless they prove that the government specifically rejected every alternative warning that the plaintiff can think to offer, the defense will not likely prevail. The resulting problem--deterring contractors from participating in the warning process--is perhaps even more acute than that presented in *Boyle*.

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[9] The *Shaw* test for the military-contractor defense in cases where the contractor participated more than minimally in the design process required the contractor to show "that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design." 778 F.2d at 746.

While the limits of known technology constrain the design alternatives that a plaintiff can offer to second-guess military designs in a design-defect case, warning theory is far less precise and far more subjective.

Whether a danger or condition is sufficiently open and obvious so as to remove the need for a warning, whether a warning should be verbal, pictorial, audible or a combination, what color, size and shape a warning should have, where it should be placed, what its exact content should be, whether its inclusion would dilute or detract from other warnings, and innumerable specific considerations as to the wisdom and feasibility of a given product warning involve at least as much art as science and allow for endless opinions. Determining which hazards to warn against, which warning methods to use, and which warning messages to impart in order to address any given hazard present almost countless options. To require the contractor to prove that it presented the government with whatever warning the plaintiff offers at trial in order to establish the defense is simply to deny the defense, given that the plaintiff will advocate a warning approach that it knows the contractor did *not* offer for the government's consideration.

Requiring the manufacturer to defend against the plaintiff's second-guessing may be an acceptable consequence of state law in purely private tort cases, *Boyle*, 487 U.S. at 513, but it does not protect the government's interest in effective contractor participation in the warnings process when the federal government procures specialized military products. If the government contractor feels constrained to present the government with every conceivable alternative in attempting to protect itself against failure-to-warn liability, then the government will lose the benefit of the contractor's true expertise, which consists of offering the government its best judgment, not every possible option.

FAILURE-TO-WARN ALLEGATIONS UNDER STATE LAW MUST BE RECONCILED WITH *BOYLE'S* THIRD PRONG

The third prong of *Boyle's* three-prong test requires the contractor to show only that it warned the government about dangers in the use of the equipment that were *known to the contractor* but not to the government. As the courts have consistently held, the third element of the defense is established in design-defect cases even if the contractor failed to disclose information that the plaintiff alleged it *should have* known. *See, e.g., Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 436 (5th Cir. 2000)("The government contractor defense does not require a contractor to warn the government of defects about which it only should have known."); *Trevino v. General Dynamics*, 865 F.2d 1474, 1487 (5th Cir. 1989)("After *Boyle*, a government contractor is only responsible for warning the government of dangers about which it has actual knowledge.")

But state-law failure-to-warn claims focus not only on what the contractor knew, but also on what the contractor should have known. Therefore, when courts that apply *Boyle* to failure-to-warn claims require the contractor to establish that the requirements of the contract limited their ability to comply with state-law warning requirements, the effect is to rewrite the third prong of *Boyle*. Because government contract terms obviously do not forbid contractors from acquiring safety related information and sharing that information with the government, the result is that the defense is unavailable against a state-law claim that the contractor *should have known* about a problem with the equipment it provided to the government.

Although the facts presented to this Court in *Boyle* required the Court to define the government-contractor defense only in design-defect cases, there is a broader need to define the manufacturer's obligations to discover latent dangers in

military designs, apart from whatever theory of recovery the plaintiff may advance. This case amply illustrates the confusion. The district court instructed the jury on the failure-to-warn claim that state law imposed a should-have-known standard, that the third prong of *Boyle* imposed an actual-knowledge standard, and that the *second* prong of *Boyle* required the contractor to show that the Army did not prohibit Sikorsky from meeting the state-imposed standards. Sikorsky Petition at App.C., p. 55a.[9] A juror, assuming the ability to sort through this maze, would ultimately have to conclude that *Boyle's* second prong negated *Boyle's* third prong. It is difficult to imagine that this is the correct application of the government-contractor defense in failure-to-warn cases.

Preserving the actual-knowledge standard set forth in *Boyle's* third prong is of pivotal importance to contractors and to the government. When contractors are required to share their actual knowledge with the government, exercising the requisite level of diligence in their communications with government-contract personnel will suffice to establish the defense and avoid liability. On the other hand, holding manufacturers to a "should have known" standard pursuant to a failure-to-warn allegation effectively nullifies *Boyle* because prevailing on a design-defect claim while losing on a failure-to-warn claim, on the very same factual allegations, renders the success of the government-contractor defense on the design-defect claim meaningless. Moreover, it provides a real-world incentive for contractors to propose extensive test and evaluation programs to explore potential risks that may be remote, creating a direct conflict between state law and the government's interest in an efficient, cost-effective procurement process.

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[9] Consistent with the practice in Petitioner's brief, AIA refers to Petitioner as "Sikorsky" throughout the remainder of this brief.

The issue of what a manufacturer of complex, unique and inherently dangerous military equipment *should have* discovered about the risks of the equipment is fraught with endless conjecture. Applying the typical state-law test of what a reasonably prudent manufacturer would do under "like circumstances"[10] is an inappropriate standard when the unique attributes of the product, the customer, and the user mean that other manufacturers are simply not in "like circumstances."[11] Developing and marketing a consumer product in the attempt to meet or create market demand has very little in common with obtaining and performing a government contract to develop an advanced weapons system for the military, where "the United States is required by the exigencies of our defense effort to push technology toward its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

What a manufacturer knows or can reasonably discover about the equipment it develops for the government flows from the exercise of government discretion regarding the time and resources allowed for the development process, the scope of testing, decisions about control of the equipment after delivery to the government, and information imparted from the

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[10] The district court instructed the jury, in pertinent part, as follows: "Reasonable care is that degree of care which a reasonably prudent manufacturer would use under like circumstances . . .. You must determine the question by placing an ordinarily prudent person in the situation of [Sikorsky] and then ask yourselves, what would such a person have done?" Sikorsky Pet. at App. C., p. 53a.

[11] The extreme danger in which the equipment is necessarily used exacerbates the problem. The district court further instructed the jury as follows: "In circumstances of slight danger a slight amount of care might be sufficient to constitute reasonable care, while in circumstances of great danger a correspondingly great amount of care would be required to constitute reasonable care." Sikorsky Pet. at App. C., p. 53a.

government to the contractor. Because state law does not account for the pervasive federal-government role in determining the nature and quantity of information that will be generated about state-of-the-art military equipment, this Court should reconcile *Boyle's* third element with state-law duties to warn.

IGNORING *BOYLE'S* BALANCE BETWEEN GOVERNMENT DISCRETION AND CONTRACTOR PARTICIPATION IN WARNING CASES CREATES A CONFLICT BETWEEN STATE LAWS AND THE FEDERAL INTEREST

In explaining that it is "hard to see why [the government-contractor defense] should apply to limit the warnings that a reasonable seller should provide to the government itself," *Densberger*, 297 F.3d at 75, the court below stated that *Boyle* requires a conflict between state and federal requirements before the government-contractor defense can apply and that "[i]t is quite plausible to say, however, that where the duty in question is a duty to warn only the government, there is no such conflict and hence that a defendant will not be able to pass the first prong of the *Boyle* test." *Id.*, n.13. These statements by the court below mischaracterize the *Boyle* rationale and ignore the reality of government contracting for military equipment.

If the government-contractor defense required a "conflict" in the sense suggested by the court below, then *Boyle* itself would never have become law. The *Boyle* defense applies where a design is found defective under state law, even though there is no "conflict" between a state's interest in compensating those injured by defective products and the government's interest in procuring non-defective products. *Boyle's* first prong permits the exercise of contractor discretion in proposing designs to the government, including the possible negligent

exercise of that discretion,[12] even though there is no "conflict" between the states' and the federal government's interest in avoiding negligently designed proposals. And *Boyle's* third prong does not hold contractors to a state-law "should-have-known" standard even though there is no "conflict" between the state's interest in holding manufacturers to that stricter standard and the federal interest in receiving as much information as possible about the products that the federal government procures. It is not these sorts of conflicts, but the more general conflict that arises when the *government's decisions* expose the *government's contractors* to liability under state law, that *Boyle* resolves.

In imposing the prerequisite of a "conflict" upon the availability of the government-contractor defense in the guise of implementing *Boyle*, the court below actually rejected *Boyle's* rationale. *Boyle* itself establishes, through its three-pronged test, "the scope of displacement" of state law necessary to resolve a conflict. One may argue whether *Boyle's* test displaces state law to an extent beyond that necessary to avoid a federal-state conflict—one may even argue that the test laid out in *Shaw* strikes a more appropriate balance—but that is an argument over the *correctness* of *Boyle*, not an argument over its application.

Boyle protects the discretionary function of the federal government, but it does so in a way that does not deter "active contractor participation in the design process," *Boyle*, 487 U.S. at 513. The opinion of the court below, and the other opinions that condition the defense on the contractor proving that the government actually prevented the contractor from proposing alternatives or providing information, badly distort that balance in failure-to-warn cases and deter contractor participation in

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[12] *Boyle* did not adopt the *Shaw* requirement that "the contractor did not participate, or participated only minimally, in the design of the defective equipment." *Boyle*, 487 U.S. at 513.

both the design and the warning aspects of developing military equipment.

Because government contracts will not *forbid* contractors from proposing particular warnings, uncovering latent defects, or sharing information, conditioning the availability of the defense on such an unrealistic showing is to deny the defense. But this is not to say that the failure to consider an alternative or to discover a new danger is divorced from the exercise of the government's discretion. The government contract controls the scope of the development effort through the contract terms, the time allowed for contract performance, specification of the test program, control of access to the equipment after delivery, and control of information flowing from the government back to the contractor. Because of this degree of control, including control of how the equipment will be used, whether a latent danger will be discovered is more a product of the government's discretion than of the contractor's.

None of these constraints affects the manufacturers of consumer products, who have complete control, subject only to market forces, over the resources to devote to product development, the time for introducing the product, and the nature and quantity of testing required to ensure safety, both pre- and post-sale. When a consumer product suffers from a latent defect or presents a latent danger warranting an additional user warning or other remedial measure, it is appropriate to ask whether a reasonable manufacturer would have discovered the defect or danger because the manufacturer typically controls the means to do so, be it through warranty, accident reports, post-sale testing, further development of the brand or model, or other activities arising out of its continuing relationship with a mass-produced product. But where the government decides what highly specialized equipment it needs for uniquely governmental tasks and then controls how the equipment will be developed, evaluated and used, the

government necessarily controls the means of discovering latent dangers in that equipment.[13]

Boyle's adoption of "reasonably precise specifications" and the actual-knowledge standard as tests for a contractor's obligation to provide the government with information and options concerning military equipment reflects a realistic understanding of the important but limited role the contractor plays when the government procures and employs specialized equipment to fill unique government needs. Lacking appreciation for the pervasive government influence over how military equipment will be designed, tested and used, the court below adopted an artificial test for failure-to-warn claims, a test that erroneously assumes that the contractor, not the government, controls the process.

THE PLAINTIFF'S CHARACTERIZATION OF THE CAUSE OF ACTION SHOULD NOT BE OUTCOME DETERMINATIVE

The court below, after questioning whether *Boyle* could apply to allegations that the government contractor failed to provide information to the government, held that, if *Boyle* did apply, the test laid out in *Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 632 (2nd Cir. 1990), would control. *Densberger*,

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[13] Government decisions not to conduct additional testing and evaluation are unquestionably discretionary government decisions. *See, e.g., Estate of Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996)(discretionary function exemption of Federal Tort Claims Act applies to federal mine inspectors' alleged negligence in failing to discover safety violations); *Meyers v. United States*, 17 F.3d 890 (6th Cir. 1994) (inspectors had discretion to choose among alternative courses of action for inspecting and monitoring coal mines); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968 (10th Cir. 1994) (Army decision not to conduct more complete investigation of aircraft crash site shielded by discretionary function exemption).

297 F.3d at 75-76. The court quoted *Grispo's* holding that, under *Boyle's* first prong, showing that the warnings met "reasonably precise specifications" meant that the contractor must show "the Government itself 'dictated' the content of the warnings meant to accompany the product" and that "the Government controlled or limited the ability of contractors . . . themselves to warn those who would come into contact with its product." *Densberger*, 297 F.3d at 76, *quoting Grispo*, 897 F.2d at 630, 632 (emphasis added).

This unworkable approach portends a problem that will plague any failure-to-warn allegation in a product liability case involving specialized military equipment until the Court clarifies *Boyle's* application to such cases. Whenever the plaintiff alleges that the defendant government contractor failed to provide some information to the government that was unknown to the government or to the contractor, but that the contractor should have known, the plaintiff may allege that the contractor's failure to discover and disclose the information resulted in a design defect. But the plaintiff can also allege in any such case that the failure to discover and disclose the information constituted a negligent failure to warn under state law.

In both cases, the government contractor may be able to establish that the government approved reasonably precise specifications, that it manufactured the product according to the specifications, and that it disclosed to the government all dangers of which it was aware and of which the government was not aware. In both cases, the contractor's and the government's actions and involvement may be identical. On the allegation of design defect, the contractor will be able to establish the government-contractor defense, with the actual-knowledge standard of its third element, and will avoid liability under Boyle. But on the failure-to-warn allegation, the contractor will be liable because the contractor cannot establish

that the government prevented the contractor from providing the allegedly missing information to the government.

When the availability of the government contractor defense depends not on the facts, but only on how the plaintiff characterizes the cause of action, government contractors cannot conform their behavior so as to preserve the defense and must assume that they will be unable to establish it--*i.e.*, unable to prove that the government prevented the contractor from sharing information. Accordingly, *Boyle's* purpose of protecting the government's interest in military procurement through a carefully tailored three-element government-contractor defense will be frustrated.

Other courts have recognized that the proper application of *Boyle* requires looking beyond the labels. In *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), the plaintiff sought to avoid the pre-*Boyle* government-contractor defense applicable to allegations of design defect by including a claim of negligent design. In reversing the district court's opinion that the defense was unavailable when the contractor was alleged to have established negligent specifications, the 4th Circuit stated:

> The policies discussed earlier apply forcefully in either a negligence or strict liability context. Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery. . . . The danger that contractors will participate less and charge more stems from the threat of liability for government-approved technology, not from the particular theory of recovery.

Id. at 408-09. *See also*, *Kerstetter*, 210 F.3d at 436, n.6 (noting with approval district court's holding that negligent inspection claim, to the extent it was based on design defect, "is displaced

by the applicability of the government contractor defense to the design defect claim").

Every design-defect or negligent-design case can be recast as a failure-to-warn case because the plaintiff can simply allege that the defect or faulty design should have been discovered and disclosed, to the ultimate user and/or the government. The government-contractor defense, which protects the government's interest in selecting equipment for the military services, should not turn on this procedural distinction.

CONCLUSION

For the foregoing reasons, AIA respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAC S. DUNAWAY
GARY E. CROSS
MATTHEW F. HALL

DUNAWAY & CROSS
1100 Connecticut Avenue, N.W.
Suite 410
WASHINGTON, D.C. 20036

Counsel for Aerospace Industries Association of America, Inc.

November 18, 2002